No. 83-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD C. FELTON *and* MARIANNE V. FELTON,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This brief is filed, with the consent of all parties, by the American Association of University Professors ("AAUP") as *amicus curiae* in support of the petition for certiorari filed February 21, 1984.

INTEREST OF THE *AMICUS*

The AAUP is a membership organization of 65,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the nation's oldest and largest organization dedicated exclu-

sively to the interests of professional scholars in all academic disciplines.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the protection of academic freedom and tenure. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by more than one hundred educational organizations and learned societies. Courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes over the terms and conditions of faculty employment.[1]

The AAUP frequently speaks for the teaching profession in matters relating to the compensation and financial security of faculty members.[2] The AAUP has been especially active over the years in addressing the application of federal tax policy to the unique income and expense patterns associated with university teaching. Because federal income taxation raises particular problems in the context of higher education, the AAUP maintains a standing Committee on Taxation and participates, on a highly selective basis, in administrative and judicial pro-

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[1] *E.g.*, *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972). *See Gray v. Board of Higher Education*, 692 F.2d 901, 907 (2d Cir. 1982) ("AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

[2] The 1940 *Statement of Principles* declares that tenure is a means to ensure "a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society." *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments, reprinted in* 64 AAUP BULL. 108, 109 (1978).

ceedings raising tax issues of consequence to faculty members.

This case presents an issue of great significance to men and women who wish to pursue careers as professional scholars while meeting their obligations as husbands, wives, and parents. The case concerns the tax treatment of travel expenses incurred by a family whose members are forced to accept jobs in different cities. This problem, encountered by many two-worker households, is especially acute for husband-and-wife faculty members. The notoriously tight job market for professorial positions is accentuated by the small number of positions available in particular academic disciplines within a particular geographic area. It is rare for a husband and wife searching for their initial academic appointments to obtain work in the same city at the same time. Frequently, their only option if they wish to continue in their chosen fields is to do what Donald and Marianne Felton did here—accept teaching positions when and where available, while accommodating their lifestyles to the inconvenience and added expense of living apart some of the time. To the extent that federal tax policy intrudes in so sensitive an area, it should preserve —not foreclose—the options available to the husband and wife who must reconcile the conflicting demands of their personal and professional lives.

The tax treatment of travel and travel-related expenses incurred by husbands and wives working in different locations is extremely important to university faculty members. The AAUP is well situated to express the views of the many professors who have a direct stake in the outcome of this case.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of Argument

This case presents a recurring question of federal income tax administration that has provoked an acknowledged conflict in the circuits. Section 162(a)(2) of the Internal Revenue Code[3] authorizes taxpayers to deduct "traveling expenses" incurred "while away from home in the pursuit of a trade or business. . . ." Because "home" is not defined in the Code or implementing regulations, courts are repeatedly required to resolve an ambiguity that arises whenever a taxpayer maintains a residence in one location and performs work in another. Some courts, including the court below in this case, have adopted the position ordinarily advocated by the Commissioner of Internal Revenue that a taxpayer's "home," for the purpose of determining deductible travel expenses under Section 162(a)(2), is the taxpayer's *principal place of business*.[4] Other courts have explicitly rejected the Commissioner's position and treated the taxpayer's *residence* as the "home" for travel-expense purposes.[5] This Court has acknowledged the division between the circuits, but has not resolved it.[6]

Section 162(a)(2) affords relief to the taxpayer who incurs out-of-pocket expenses because of the demands or exigencies of the job. The statute allows the taxpayer

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[3] 26 U.S.C. § 162(a)(2) (1976).

[4] *E.g.*, *Weiberg v. Comm'r*, 639 F.2d 434 (8th Cir. 1981); *Michel v. Comm'r*, 629 F.2d 1071 (5th Cir. 1980). *See* Rev. Rul. 60-189, 1960-1 C.B. 60, *amplified in* Rev. Rul. 83-82, 1983-1 C.B. 45.

The Commissioner, however, has not been entirely consistent in defining the statutory term "home" for travel-deduction purposes. *E.g.*, Rev. Rul. 73-529, 1973-2 C.B. 37, 38; *Rambo v. Comm'r*, 69 T.C. 920, 923-25 (1978) (arguing that "home" means "residence").

[5] *E.g.*, *Six v. United States*, 450 F.2d 66 (2d Cir. 1971); *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 884 (1971).

[6] *See Comm'r v. Stidger*, 386 U.S. 287, 291 (1967).

to deduct the cost of amenities (such as food and lodging) that are ordinarily treated as personal expenses when the taxpayer is "home." The general principle underlying the deduction is that there are circumstances under which the taxpayer cannot reasonably be expected to change residence just to minimize or avoid work-related expenses. The most common example of such a circumstance is the taxpayer who is assigned temporarily to a job in another city with the expectation that he or she will return home when the temporary tour of duty is over; the Service and the courts agree that the taxpayer's travel expenses are fully deductible.[7]

This does not mean, however, that the location of the taxpayer's "home" for tax purposes should be determined in every instance by mechanical reliance on the duration of the taxpayer's employment in a distant city. Professor Marianne Felton's case involves the application of the general principle underlying the Section 162(a)(2) deduction to the increasingly common predicament of a husband and wife compelled by the academic job market to maintain a secondary residence in addition to the marital home. We urge the Court to grant the writ of certiorari in order to consider adopting a rule that permits the deduction of travel expenses when a taxpayer travels to and from the secondary or minor place of work of the marital unit. The tax laws already contain a test for identifying an individual taxpayer's secondary or minor place of work for the purpose of determining deductible expenses incurred while traveling between two jobs. That test could easily be applied to a marital unit of two workers.

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[7] Rev. Rul. 83-82, 1983-1 C.B. 45. *See Comm'r v. Mooneyhan*, 404 F.2d 522 (6th Cir. 1968), *cert. denied*, 394 U.S. 1001 (1969).

Argument

Most taxpayers do not live in the same building in which they work, and are thus required to travel between work and home. The expenses associated with that travel are clearly work-related, in the sense that they are not incurred by taxpayers who do not work; they are at the same time personal, because they reflect the taxpayer's personal judgment that work and residence should be separated. The law is clear that, when personal preference predominates, travel costs are deemed to be nondeductible personal expenses. *Commissioner v. Flowers*, 326 U.S. 465 (1946). The question in this case is whether a different rule should apply in the case of a married woman who can pursue a professional career in the field of her choice only by working a hundred miles from the home in which she lives with her husband.

The operating principle behind the travel-expense deduction was explained by the United States Tax Court in *Goodman v. Commissioner*, 30 T.C.M. (CCH) 1369, 1371 (1971):

> In the final analysis, the question is whether it would be reasonable in the circumstances of the particular case to expect the taxpayer to move his family to the new work location and establish his permanent residence in that area. If so, . . . the place of employment becomes his tax home . . . [and] the cost of his meals, lodging, and related items are not deductible under section 162(a)(2).

Accord, *Hantzis v. Commissioner*, 38 T.C.M. (CCH) 1169, 1171 (1979), *rev'd on other grounds*, 638 F.2d 248, (1st Cir. 1981); *Rosenspan v. United States*, 438 F.2d 905, 912 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971). Consistent with this general principle, the Service allows workers who are temporarily reassigned to distant cities to deduct their travel expenses. Rev. Rul. 73-529, 1973-2 C.B. 37; Rev. Rul. 83-82, 1983-1 C.B. 45. The Service justifies its "temporary assignment" rules by making

the common-sense argument that it is unreasonable to expect a worker with a temporary job to go to the expense and aggravation of moving the household just to reduce travel-related costs.

The temporary assignment rules represent an *application* of the underlying "reasonableness of the move" principle, not a *substitute for* that principle. The temporary assignment rules apply to the discrete situation of a taxpayer with one job. The Feltons are in a different situation. They have two jobs, not one. Under the circumstances, it makes more sense to apply another standard of "reasonableness" routinely used by the Commissioner in the two-job context. That standard is the familiar "secondary or minor place of business" test used for the individual taxpayer who travels between two jobs. *See* Rev. Rul. 75-432, 1975-2 C.B. 60, 61. In the context of the two-worker household, the spouse who works at the secondary or minor place of business of the marital unit would be allowed to deduct travel expenses incurred while away from the marital home.

In essence, there is a fairly exact analogy between an individual taxpayer who performs two jobs and a husband and wife filing a joint income tax return who also realize income from two jobs and incur precisely the same kinds of employment-related travel expenses. The courts have developed standard criteria for distinguishing between an individual taxpayer's primary and secondary places of business; these same criteria could be applied usefully and productively in cases involving the primary and secondary workplaces of a two-worker household.[8]

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[8] In *Markey v. Comm'r*, 490 F.2d 1249, 1255 (6th Cir. 1974), for example, the court identified three objective criteria for determining which of two places of business constituted the taxpayer's primary workplace:

—The relative amount of time spent in each place;

[Continued]

There is no doubt in this case that Marianne Felton's job in New Albany, Indiana, was the family's secondary job. For ten years, her husband's job in Bloomington was the family's sole source of income. Even after Mrs. Felton secured employment in New Albany, the Feltons spent most of their work hours in Bloomington and earned most of their family income from work performed there. For reasons relating to Donald Felton's eligibility for retirement benefits, he could not give up his position in Bloomington and seek employment closer to New Albany. Separate jobs in the two cities were the best the family could do, given Mrs. Felton's desire to pursue a professional career of her own and Mr. Felton's professional and financial ties to the city in which the couple had long resided.

Under the circumstances, the Feltons could not reasonably have been expected to move to New Albany. Bloomington was the couple's "regular place of abode in a real and substantial sense," [9] and therefore should have been treated as their "home" as that term is used in Section 162(a)(2).

The decision of the court below, like the Service's position, is unfaithful to the policies served by the statute. The fault lies in the Service's unwillingness to acknowledge one of the great social and demographic transformations of our era. The two-worker household is now commonplace in the United States.[10] In the academic

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[8] [Continued]

—The relative amount of business activity conducted in each place; and

—The proportion of income derived from each place.

These same criteria could easily be applied when the husband works in one place and the wife works in another to determine which place should be deemed "home" for purposes of calculating deductible travel expenses.

[9] Rev. Rul. 73-529, 1973-2 C.B. 37, 38.

[10] Half of all American families contain two or more workers. U.S. BUR. OF THE CENSUS, MONEY INCOME OF FAMILIES AND PERSONS IN THE UNITED STATES: 1979, Table D (1981).

world in particular, and in other realms as well, spouses often travel to a regular business destination away from the marital home. Their reasons for doing so may bear no relationship to the reasons that prompt a worker who is temporarily reassigned to another location to maintain the same residence instead of moving; it is a mistake, legally and socially, to be guided in the former context by rules designed to fit the latter.

The Feltons' case calls for the application of traditional doctrine to a distinctly contemporary set of facts, a task that is one of the most important functions of this Court. Although Congress has addressed the problems of two-worker households in other contexts,[11] it has been silent on the ambiguity in Section 162(a)(2) of the Code despite invitations to fashion a legislative remedy.[12] We are confronted by one of those interstices in legislation that Justice Cardozo suggested should be filled by the courts.[13] The first step in filling the gap is to grant the writ of certiorari here.

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[11] *E.g.*, Internal Revenue Code of 1954, § 44A, 26 U.S.C. § 44A (Supp. V 1981) (child care expenses); *id.* § 221, 26 U.S.C. § 221 (Supp. V 1981) (marriage tax).

[12] *See Comm'r v. Stidger*, 386 U.S. 287, 296 (1967).

[13] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 68-69 (1921).

CONCLUSION

The writ should be granted, as it was in *United States v. Correll*, 389 U.S. 299, 301 (1967), "to resolve a conflict among the circuits on this recurring question of federal income tax administration."

Respectfully submitted,

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